Supreme Court, U.S.
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Docket No. _____

IN THE UNITED STATES SUPREME COURT

ROBERT J. DEBRY AND ASSOCIATES, P.C.,
a Utah corporation,

Petitioner,

vs.

QWEST DEX, INC., a Colorado corporation, and
DEX MEDIA WEST, LLC, a Delaware Limited Liability
corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(a) QUESTION PRESENTED FOR REVIEW

The question presented for review is the following:

Where federal courts of appeals certify legal issues to state supreme courts, and the state courts sidestep the legal issues by twisting the facts, should this Court instruct the federal courts of appeals to

(1) ignore the fact-finding rulings of the state courts, and

(2) take the cases back and answer the state court questions?

(b) LIST OF PARTIES

The above caption of this case contains the names of all the parties to the proceeding in the court whose judgment is sought to be reviewed.

Robert J. DeBry and Associates, P.C. is a nongovernmental Utah corporation. It does not have a parent corporation, nor is there any publicly held company that owns more than 10% of this corporation's stock.

(c) TABLE OF CONTENTS

(a) QUESTION PRESENTED FOR REVIEW iii

(b) LIST OF PARTIES iv

(c) TABLE OF CONTENTS v

TABLE OF CITED AUTHORITIES vii

(d) CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW IN THIS CASE 1

(e) BASIS FOR JURISDICTION 1

(f) PERTINENT PROVISIONS FROM CONSTITUTIONS, STATUTES, ETC. 3

(g) STATEMENT OF THE CASE 5

FACTS 5

DeBry's Legal Theory in State Court 8

FEDERAL JURISDICTION BELOW 9

Removal and Appeal 9

Certification Order 9

(h) ARGUMENT 11

I. THE UTAH SUPREME COURT HAD NO POWER TO DECIDE FACT ISSUES. 11

II. IMPORTANCE OF CERTIORARI 14

(i) APPENDIX 16

i Orders entered in conjunction with judgment to be reviewed:

A *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 04-4049 (10th Cir., Mar. 21, 2005) (order certifying state law question)

B *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, 2006 UT 41, 144 P.3d 1079

C *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 04-4049 (10th Cir., Aug. 4, 2006)

ii Other relevant orders:

D *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 03cv0099 (D. Utah, Mar. 4, 2004) (order granting defendants' motion to dismiss)

iii Orders on rehearing:

E *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 20050299 (Utah, Sep. 15, 2006) (order denying rehearing)

F *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 04-4049 (10th Cir., Oct. 18, 2006) (order denying rehearing)

TABLE OF CITED AUTHORITIES

CASES

Lehman Brothers v. Schein, 416 U.S. 386, 94 S. Ct. 1741, 40 L.Ed.2d 215 (1974) 14

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., 2006 UT 41, 144 P.3d 1079 ..... 1, 9, 11-13, 16

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., No. 04-4049 (10th Cir., Aug. 4, 2006) 1, 10, 16

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., No. 03cv0099 (D. Utah, Mar. 4, 2004) 1, 9, 16

Young v. Harper, 520 U.S. 143, 117 S.Ct. 1148, 137 L.Ed.2d 270 (1997) 2

CONSTITUTIONAL PROVISIONS

Article III of the *United States Constitution* 2, 3

STATUTES

28 U.S.C. § 1332 ..... 3, 9

28 U.S.C. § 1441 ..... 3, 4, 9

28 U.S.C. § 1446 9

28 U.S.C. § 2101 2

§13-11a-1, et seq., *Utah Code* 8, 9

RULES

Rule 41(c[illegible]) of the *Utah Rules of Appellate Procedure* . 11

OTHER

ABA *Reporter's Explanation of Changes* to Model Rule 7.2 8

American Bar Association's Model Rule 7.2 . . . . . 7, 8

Oxford American College Dictionary, 2002 . . . . . 13, 14

(d) CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW IN THIS CASE

The opinions and orders entered below in this case are as follows:

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., No. 04-4049 (10th Cir., Mar. 21, 2005) (order certifying state law question) (Appendix A)

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., 2006 UT 41, 144 P.3d 1079 (*rehearing denied*, Sep. 15, 2006) (Appendix B)

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., No. 04-4049 (10th Cir., Aug. 4, 2006) (*rehearing denied*, Oct. 18, 2006) (Appendix C)

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., No. 03cv0099 (D. Utah, Mar. 4, 2004) (order granting defendants' motion to dismiss) (Appendix D)

(e) BASIS FOR JURISDICTION

(i) Date the judgment sought to be reviewed was entered.

On August 4, 2006, the United States Court of Appeals for the Tenth Circuit entered its Order and Judgment in *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 04-4049 (App. C). Petitioner Robert J. DeBry and Associates ("DeBry") seeks review of that Judgment.

(ii) Date of order denying rehearing.

On October 18, 2006, the Tenth Circuit denied DeBry's Petition for Rehearing on the merits. (App. F.)

(iii) Extension of time for filing petition for rehearing.

On August 18, 2006, the Tenth Circuit had granted DeBry an extension of time to submit a petition for rehearing until 14 days after the Utah Supreme Court ruled on DeBry's state petition for rehearing in a related matter. The Utah Supreme Court's denied that petition for rehearing on September 15, 2006. App. E. DeBry filed its Petition for Rehearing with the Tenth Circuit within the 14 days allowed, specifically, on September 29, 2006.

Under Rule 13 of the Rules of the Supreme Court of the United States, DeBry has until January 16, 2007, to file a petition for writ of certiorari. Accordingly, this Petition for Writ of Certiorari is timely filed, and this Court has jurisdiction. *Young v. Harper*, 520 U.S. 143, 147, n. 1, 117 S.Ct. 1148, 137 L.Ed.2d 270 (1997).

(iv) Statutory provision conferring jurisdiction on certiorari.

This Court's jurisdiction may be invoked by a petition for writ of certiorari thus timely filed. 28 U.S.C. § 2101. The judicial power of the United States is vested in the Supreme Court. Article III, Section 1 of the *United States Constitution.* This power extends to all cases between citizens of different states. Article III, Section 2. Petitioner DeBry is a citizen of Utah; respondents are not. Rather, the respondents are citizens of Colorado and Delaware, respectively.

(f) PERTINENT PROVISIONS FROM CONSTITUTIONS, STATUTES, ETC.

Article III of the *United States Constitution*

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

. . .

Chapter 28 of the *United States Code*:

Section 1332 (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

. . .

Section 1441(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which

the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

. . .

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(g) STATEMENT OF THE CASE

FACTS

1. DeBry is a law firm located in Salt Lake City, Utah.

2. DeBry opened branch offices in Ogden,[1] Utah and Provo,[2] Utah. *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 04-4049 (10th Cir., Mar. 21, 2005) (order certifying state law question) (hereafter, Certification Order).

3. DeBry purchased yellow pages advertising in the Ogden and Provo yellow pages phone books. DeBry's yellow page advertising included local addresses for their Ogden and Provo offices.[3]

4. Siegfried & Jensen[4] is a law firm located in Salt Lake City. Siegfried and Jensen does not have branch offices or local offices in Ogden or Provo. Nevertheless, Siegfried & Jensen purchased yellow pages advertising in the Ogden and Provo yellow pages. Below is a sample advertisement found

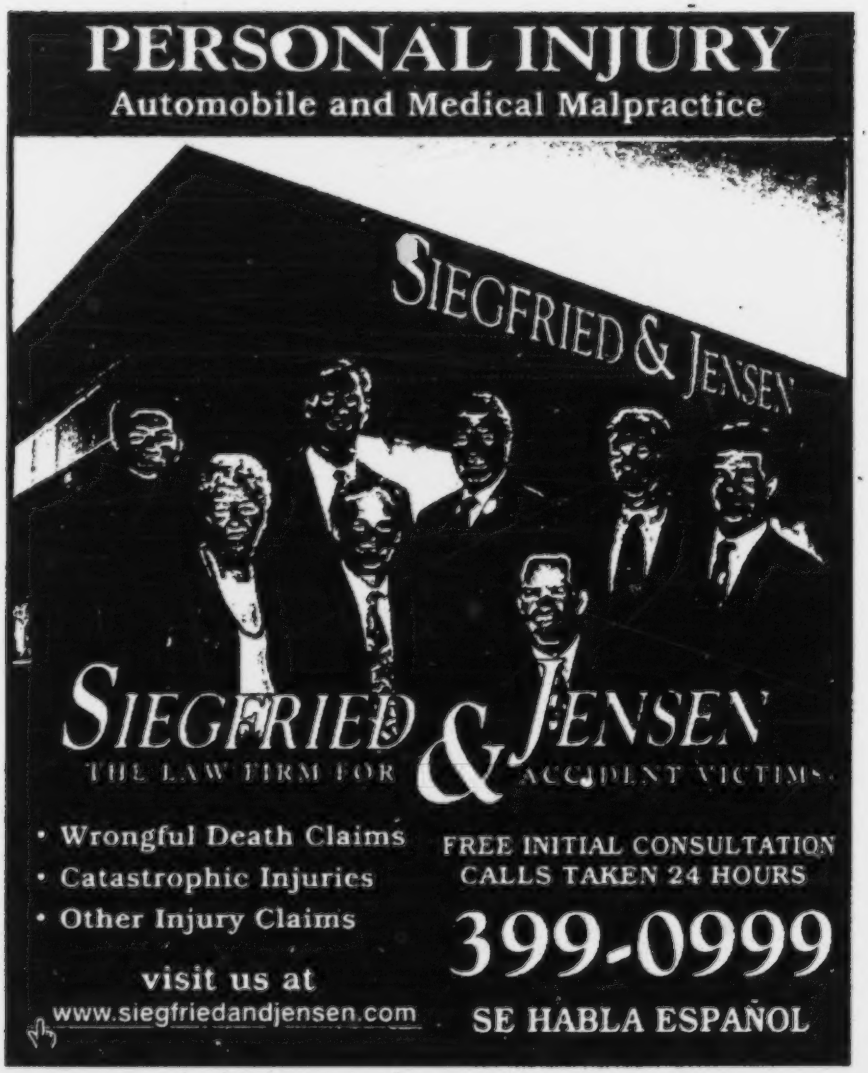
---

[1]Ogden is a city of approximately 80,000 residents located 35 miles north of Salt Lake City.

[2]Provo is a city of approximately 110,000 residents located 45 miles south of Salt Lake City.

[3]See the Dex yellow pages for Ogden (2002/2003, pages 46-47) and Provo (2002, pages 50-51).

[4]The law firm of Siegfried & Jensen is used here as an example only. Other Salt Lake City law firms and Salt Lake City businesses with no local offices in Ogden or Provo also purchase similar yellow page advertising in the Ogden and Provo yellow pages.



on page 58 of the 2001/2002 Dex yellow pages for Ogden, Utah. Note especially that no local address is listed in the Ogden or Provo ad because the Siegfried & Jensen office is really in Salt Lake City.

5. Note also that the prefix listed for Siegfried & Jensen in the Ogden yellow pages (below) is 399. Page 98 of the 2001/2002 Ogden directory includes the following language:

> The prefix(es) listed beside your community [Ogden] . . . represent your local calling area
>
> . . .
>
> (317, 332, 334, 337, 340, 387, 392, 393, 394, 395, 398, **399**, 409, 419, 436, 452, 457, 459, 469, 475, 476, 479, 528, 605, 612, 620, 621, 622, 624, 625, 626, 627, 629, 640, 643, 648, 650, 659, 670, 681, 689, 697, 701, 704, 707, 720, 729, 730, 731, 732, 737, 740, 749, 751, 752, 757, 760, 761, 769, 778, 781, 782, 786, 810, 866, 881, 901, 917) (Emphasis added.)

6. As noted above, 399 is listed by Dex as an Ogden prefix. But Siegfried & Jensen paid extra money to Dex to use the 399 prefix in the Ogden yellow pages. This concept of selling a local Ogden prefix (viz, 399) to a business with no physical office in Ogden is known as a Market Expansion Line. App. A-3.

7. A statistical survey in Ogden has shown that 67% of Dex customers are "tricked or misled" when they see an advertisement (such as the Siegfried and Jensen advertisement on p. 8 above) in their Ogden directory which includes an Ogden telephone number printed, but no address, because they believe that the business or professional actually has a local Ogden office, when there is in fact no local Ogden office (but only a "Market Expansion Line"). *Id.*

8. American Bar Association's Model Rule 7.2 states:

> Any communication made pursuant to this Rule shall include the name and office address of at

least one lawyer or law firm responsible for its content.

9. The reasoning for this rule is found in ABA *Reporter's Explanation of Changes* to Model Rule 7.2:

> Because . . . lawyers frequently advertise in locations where they do not maintain an office, the Commission has added a requirement that each advertisement include an office address for the law firm or lawyer named in the advertisement. This information . . . will provide prospective clients with important information about where the lawyer or law firm is located – an important fact in this era of multi-jurisdictional advertising.[5]

DeBry's Legal Theory in State Court

10. Based upon all of the above facts, DeBry sued Dex in state court under the Utah Truth In Advertising Act (§13-11a-1, et seq., *Utah Code*) (App. A-3):

> (1) Deceptive trade practices occur when, in the course of his business, vocation, or occupation:
>
> . . .
>
> (b) A person causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services.
>
> . . .

---

[5]This case is not about lawyer ethics. However, the ABA Model Rule is included here to show that the ABA has interpreted such conduct (buying a yellow pages ad in a distant city without listing a physical address) as misleading.

(d) A person uses deceptive representations or designations of geographic origin in connection with goods or services.

. . .

(t) A person engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

FEDERAL JURISDICTION BELOW

Removal and Appeal

11. On September 3, 2003, Dex removed the case to federal court pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. App. A-3, 4. The U.S District Court for Utah had jurisdiction of this controversy since DeBry is a citizen of Utah and Dex is not, and DeBry has not restricted the amount of damages it seeks to less than $75,000.

12. On March 5, 2004, the District Court for Utah dismissed the action on its pleadings. App. D. DeBry appealed the dismissal to the Tenth Circuit on March 12, 2004. App. B-4.

Certification Order

13. After the case was briefed and argued, the Tenth Circuit noted that no Utah appellate court had construed the UTIAA. It therefore certified a question of law to the Utah Supreme Court, reciting the substantive facts set forth above. App. A.

14. The Utah Supreme Court dutifully quoted the facts in the certification order, but pointedly based its conclusions on substantially different facts. App. B.

15. Based on these new facts, the Utah Supreme Court concluded "Dex has not acted in violation of the Utah Truth in Advertising Act (UTIAA)." App. B-9.

16. Within a week, the Tenth Circuit perfunctorily affirmed the U.S. District Court's dismissal of this action. App. C.

17. In like manner, the Tenth Circuit summarily denied DeBry's Petition for Rehearing. App. E.

(h) ARGUMENT

I. THE UTAH SUPREME COURT HAD NO POWER TO DECIDE FACT ISSUES.

Rule 41(c)(2) of the *Utah Rules of Appellate Procedure* states in part:

> The [federal order of certification] shall also set forth all facts which are relevant to the determination of the certified question. (Emphasis added.)

The Tenth Circuit Order Certifying Question of State Law stated (App. A-2) that the Utah Court was given

> [t]he facts relevant to the determination of the certified question.

Hence, the Utah Supreme Court was to use the facts set forth in the Certification Order. As shown below, however, the Utah Court based its Opinion (App. B) on facts other than those set forth in the Certification Order.

In the initial paragraphs of its Opinion (App. B-2 to -4), the Utah Supreme Court recites the facts presented in the Certification Order (App. A). It also agrees that it must answer a "question of law." App. B-5. The Opinion, however, goes on to rely upon (supposed) facts not found in the Certification Order.

For example, the Certification Order (App. A-3) recited:

> Dex's telephone directories state "the prefix(es) listed beside your community and those communities listed below it, represent your local calling area." (Emphasis added.)

The Opinion (App. B-8), however, stated:

> Dex merely lists the contact information . . . regardless of the businesses' geographic locations. For example, by listing the [local] number for the [distant] firm, Dex does not represent the [distant] firm has an office in the [local] calling area--it only informs customers that the firm is willing to provide its services to those located in the [local] calling area. (Emphasis added.)

The (supposed) fact set forth above is found nowhere in the Certification Order, and nowhere in the Dex telephone directory.

Likewise, the Certification Order (App. A-3) recited:

> 67% of Dex customers are tricked or misled when they see a "Market Expansion Line" telephone number in their local Dex yellow page directory with no listed address, because they believe that the business or profession actually has a [local] office. (Emphasis added.)

The Opinion (App. B-9), however, stated:

> [S]ome may presume that businesses with a local number have an office in the vicinity.(Emphasis added.)

In summary, the following chart gives examples of how the Opinion of the Utah Supreme Court created facts different from those set forth in the Tenth Circuit's Certification Order:

FACTS ACCORDING TO FEDERAL COURT (U. S. TENTH CIRCUIT - APP. A)	FACTS ACCORDING TO STATE COURT (UTAH SUPREME COURT - APP. B)
"67% of Dex customers are tricked or misled" by the type of advertisements at issue in this case. App. A-3. (Emphasis added.)	". . . some may presume that businesses with a local number have an office in the vicinity." App. B-9. (Emphasis added.)
* * *	* * *
Dex's telephone directories state "the prefix(es) listed beside your community and those communities listed below it, represent your local calling area." App. A-2. (Emphasis added.)	[B]y listing the [local] number for the [distant] firm, Dex does not represent the [distant] firm has an office in the [local] calling area--it only informs customers that the firm is willing to provide its services to those located in the [local] calling area. App. B-8. (Emphasis added.)

The difference between the two versions of facts described above (the Utah Supreme Court version versus the Tenth Circuit Court version) is huge. The reality is that 67% is a majority – indeed a large majority. On the other hand, the *Oxford American College Dictionary*, 2002 defines the word "some" as follows:

> At least a small amount or number of people or things.

Further, the *Oxford American College Dictionary* defines the word "trick" as

> A cunning and skillful act or scheme intended to deceive or outwit someone.

In sum, the Utah Supreme Court should have applied Utah law to the factual scenario set forth in the Certification Order. The Utah Supreme Court had no power to change the facts.

II. IMPORTANCE OF CERTIORARI

The concept that a federal court can ask (or "certify") questions of state law to state supreme courts represents a delicate balance between federal and state courts. (Sometimes referred to as comity.) As the United States Supreme Court said in *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L.Ed.2d 215 (1974):

> It [certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.

But state legal issues may be complex and time-consuming. Therefore, a state supreme court may be tempted (as here) to sidestep the legal issues by twisting the facts. Probably, there are many many other cases, certified by federal courts, where the state legal issue never gets answered. And if that continues to happen (viz, state courts sidestepping legal issues by twisting facts), the entire concept of state court certification will crumble.

In summary, if state supreme courts (in certification cases) sidestep the legal issue by twisting fact, the federal courts of appeals must be instructed to ignore such fact-finding rulings by state courts. Further, where state supreme courts (in certification cases) ignore or sidestep the legal issue presented,

this Court must instruct federal courts that the case is not over. Federal courts of appeals should be instructed that under such circumstances (where the state supreme court answers fact questions and sidesteps legal questions), the work of the court of appeals is not done. The only method to cure this defect is for the federal court of appeals to take the case back and answer the state court question. Otherwise, the whole system will crumble.

DATED this 15th day of January, 2007.

LYNN P. HEWARD
Attorney for Petitioner

(i) APPENDIX

i Orders entered in conjunction with judgment to be reviewed:

A *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 04-4049 (10th Cir., Mar. 21, 2005) (order certifying state law question)

B *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, 2006 UT 41, 144 P.3d 1079

C *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 04-4049 (10th Cir., Aug. 4, 2006)

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F *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, No. 04-4049 (10th Cir., Oct. 18, 2006) (order denying rehearing)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT J. DEBRY AND ASSOCIATES, P.C., a Utah corporation,

Plaintiff-Appellant,

v.

QWEST DEX, INC., a Colorado corporation; and DEX MEDIA WEST, LLC, a Delaware limited liability corporation,

Defendants-Appellees.

No. 04-4049

(D.C. No. 03cv0099)

(D. Utah)

ORDER CERTIFYING STATE LAW QUESTION

Before HENRY, BALDOCK, and BRISCOE, Circuit Judges.

The United. States Court of Appeals for the Tenth Circuit, on its own motion pursuant to 10th Cir. R. 27.1 and Utah R. App. P. 41, certifies the following question to the Utah Supreme Court:

> Whether Defendants violated Utah Code Ann. § 13-11a-3(1)(b), (d), *or* (t)[1] when they

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[1]Section 13-11a-3 provides in relevant part:
(1) Deceptive trade practices occur when, in the course of his business, vocation, or occupation:

. . .

(b) A person causes likelihood of confusion or misunderstanding as to the source, sponsorship,

> published in their 2003-2004 Ogden-area telephone directory a table of numerical prefixes associated with a "local calling area" and advertisements by third parties that include a market expansion line telephone number without any physical business address; and if so, whether Defendants are exempt from liability under Utah Code Ann. § 13-11a-5(1).[2]

The certified question is dispositive of an issue of law in a proceeding before the Tenth Circuit and no Utah law appears to control the answer to the certified question. See Utah R. App. P. 41(c)(1)(B)-(C). The facts relevant to the determination of the certified question are set forth below. Utah R. App. P. 41(e)(2).

I.

Defendants Qwest Dex, Inc. and Dex Media West, LLC (collectively "Dex") print telephone directories in Utah. Each city in Utah has a series of numerical prefixes for telephone listings in that city. Dex's telephone directories state "the prefix(es) listed beside your community and those communities listed below it, represent your local calling area." The

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> approval, or certification of goods or services.
>
> . . .
>
> (d) A person uses deceptive representations or designations of geographic Origin in connection with goods and services.
>
> . . .
>
> (t) A person engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding.

[2]Section 13-1 la-5(1) provides the Utah Truth in Advertising Act does not apply to "conduct incompliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency[.]"

directories then list all the prefixes associated with the local calling area.

Dex's customers may purchase a market expansion line ("MEL") number from the company. A MEL number allows members of the public in a particular region to dial a local telephone number and connect with an out-of-region business without incurring long distance charges. For example, a Salt Lake City business may secure a MEL number with an Ogden prefix, thereby permitting a person in Ogden to call the Salt Lake City, business without incurring long distance charges. Dex, through it yellow pages, allows businesses to advertise their goods or services with their MEL number. Dex does not require businesses to include a physical address in their advertisements. Dex's MEL program is in compliance with the terms and conditions of an "Exchange and Network Services Tariff' on file with the Utah Public Service Commission.

Plaintiff Robert J. Debry and Associates, P.C. ("Debry") opened law offices in Ogden and Provo. Apparently concerned with Dex's MEL program, Debry hired a marketing research firm to conduct a survey in the Ogden area. The survey "show(ed] that 67% of Dex customers are tricked or misled when they see a 'Market Expansion Line' telephone number in their local Dex yellow page directory with no listed address, because they believe that the business or profession actually has a local Ogden office." Debry provided the results of the survey to Dex.

Debry thereafter sued Dex in the second district court, Weber county, Utah. Debry alleged Dex's sale of advertisements with a MEL number and without a corresponding business address violated three subsections of the Utah Truth in Advertising Act ("UTIAA"). See Utah Code Ann. § 13-1 la-3(1)(b), (d), (t). Debry further alleged it incurred damages as a result of Dcx's MEL program. Dex

removed the case to the United States District Court for the District of Utah. See 28 U.S.C. § 1441.

The federal district court dismissed Debry's complaint for failure to state claim upon which relief could be granted under the UTIAA. See Fed. R. Civ. P. 12(b)(6). The court first found Debry's claim under Utah Code Ann. § 13-11a-3(1)(b) failed because Debry's complaint did not allege Dex's MEL program caused a likelihood of confusion as to the "source" of goods or services. The court interpreted "source" as referring to a "product's *manufacturer* or a service's *provider* rather than the *geographic location* in which the product or service originates." The court next found Debry's claim under § 13-11a-3(1)(d) failed because Dex did not make any deceptive representations or designations of geographic origin in connection with goods or services. Instead, the court reasoned Dex did not make *any* representations or designations as to the geographic origin of legal services because the Ogden telephone directory *only* "convey[ed] to phone book users the prefixes they may dial from an Ogden telephone without incurring long distance charges." Finally, the court found Debry's claim under § 13-11a-3(1)(t) failed because Debry did not plead facts that, if true, would show Dex' s MEL program created a likelihood of confusion or misunderstanding. The court, in light of its conclusion that Debry failed to state a claim upon which relief could be granted, did not decide the question whether Dex was exempt from liability under the UTIAA because its conduct was in compliance with a tariff on file with the Utah Public Service Commission. See Utah Code Ann. § 13-11a-5(1).

II.

This proceeding involves important questions of Utah law. Neither the Utah Supreme Court nor the Utah Court of Appeals have decided a case arising under the UTIAA.

Therefore, this court concludes certification of the above question would further the interests of comity and federalism by giving the Utah Supreme Court an opportunity to answer the question in the first instance should it elect to do so under Utah R. App. P. 41(e). The Clerk of this court shall transmit a copy of this certification order to counsel for all parties. The Clerk shall also forward, under the Tenth Circuit's official seal, a copy of this certification order and the briefs filed in this court to the Utah Supreme Court. This appeal is ordered STAYED pending resolution of the certified question.

Entered for the Court

s/ Bobby R. Baldock
Circuit Judge

[Robert J. DeBry and Associates, P.C. v. Qwest Dex,
144 P.3d 1079
Utah,2006.
144 P.3d 1079, 557 Utah Adv. Rep. 35, 2006 UT 41]

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT J. DeBRY AND ASSOCIATES, P.C., a Utah corporation, Plaintiff and Appellant,

v.

QWEST DEX, INC., a Colorado corporation; and Dex Media West, LLC, a Delaware limited liability corporation, Defendants and Appellees.

No. 20050299.

Filed July 28, 2006.

Rehearing Denied Sept. 15, 2006.

Federal Certification

Attorneys *1079 Lynn P. Heward, Salt Lake City, for plaintiff.
Joseph J. Joyce, James D. Franckowiak, Salt Lake City, Bobbee J. Musgrave, Paul J. Lopach, Denver, CO, for defendant.

WILKINS, Associate Chief Justice:

¶1 Defendants Qwest Dex, Inc., and Dex Media West LLC (collectively, "Dex") permit out-of-area businesses to purchase local phone numbers and to advertise their available goods and services in the Ogden area telephone directory. We have been asked by the United States Court of Appeals for the Tenth Circuit to determine whether Defendants violated Utah Code section 13-11a-3(1)(b), (d), or (t) by publishing both a

table of numerical prefixes associated with "a local calling area" and advertisements by third parties that include a market expansion line *1080 telephone number without any physical business address; and if so, whether Defendants are exempt from liability under Utah Code section 13-11a-5(1). We conclude that Dex's actions did not violate Utah Code section 13-11a-3(1). As a result, it is unnecessary for us to address whether Dex is exempt under section 13-11a-5(1).

BACKGROUND

I. FACTUAL BACKGROUND

¶2 "We accept as true the facts described by the [Tenth Circuit] in the certification order."[1]

¶3 Dex prints telephone directories, containing residential and corporate phone numbers, throughout the State of Utah. It also sells advertising in the "yellow page" section of its directories.

¶4 Each city in Utah has a specific series of numerical prefixes associated with the telephone listings in that city. Toward the front of the phone book, Dex provides its customers with a list of all prefixes affiliated with the local calling area and states that "the prefix(es) listed beside your community and those communities listed below it represent your local calling area."

¶5 Dex permits businesses that do not have a "local presence" in the particular geographic area to purchase a local telephone number, known as a "Market Expansion Line" (MEL), to be listed in the telephone directory.[2] An MEL allows

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[1] *In re Kunz*, 2004 UT 71, ¶ 2, 99 P.3d 793.

[2] Some of these companies include the law firm of Siegfried & Jensen, and a printer repair company known as Copy Doc, Inc.

customers to dial local telephone numbers to connect with out-of-area businesses without incurring long distance charges. The MEL phone numbers contain the designated numerical prefixes for telephone listings in the specific geographic area. For example, a business in Salt Lake City may purchase an MEL number with an Ogden prefix, and a person in Ogden may then call the Salt Lake City business without incurring long distance charges.

¶6 The Utah Public Service Commission, the government agency responsible for telephone communications in the state, has a written agreement with Dex regarding the MEL program. The agreement, known as the "Exchange and Network Services Tariff" (the Tariff), requires Dex to provide "one free listing in the White and Yellow Page directories covering the exchange in which the MEL CO is located." "[H]owever, at the customer's request, the listing may be omitted at no charge." The language of the Tariff does not expressly or impliedly require that the yellow page listing contain an address.

¶7 Plaintiff Robert J. DeBry and Associates (DeBry) hired a marketing research firm to conduct a survey in the Ogden area about the potential confusion resulting from Dex's MEL program. The survey "show[ed] that 67% of Dex customers are tricked or misled when they see a 'Market Expansion Line' telephone number in their local Dex yellow page directory with no listed address, because they believe that the business or profession actually has a local Ogden office." DeBry sent the results of the survey to Dex.

¶8 DeBry contends that the advertisements containing MEL numbers without addresses are deceptive and violate

section 13-11a-3(1)(b), (d), and (t) of the Utah Truth in Advertising Act (UTIAA).[3]

II. PROCEDURAL BACKGROUND

¶9 DeBry sued Dex in a state district court for violations of the UTIAA. Dex removed the case to the United States District Court for the District of Utah. Pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure, the federal district court dismissed DeBry's complaint for failure to state a claim upon which relief can be granted. Because Dex's conduct was in compliance with the Tariff on file, the federal district court did not decide the question of whether Dex was exempt from liability under the *1081 UTIAA.[4]

¶10 DeBry appealed to the Tenth Circuit of the United States. The Tenth Circuit, recognizing that neither the Utah Supreme Court nor the Utah Court of Appeals has yet decided a case arising under the UTIAA, certified the above question for our review.

ANALYSIS

¶11 The Tenth Circuit has asked us for guidance in this specific area of Utah law. Accordingly, we are not presented with a decision to affirm or reverse, and traditional standards of review do not apply.[5] We have jurisdiction under Utah Code

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[3]Utah Code Ann. §§ 13-11a-3(1)(b), (d), (t) (2006).

[4]*See id.* §§ 13-11a-5(1).

[5]*See Miller v. United States*, 2004 UT 96, ¶¶ 10, 104 P.3d 1202, 1204.

section 78-2-2(1) to answer a question of law certified by the Tenth Circuit.[6]

¶12 This is a case of statutory interpretation. We have not been asked to focus on the merits of the federal court's 12(b)(6) motion. Therefore, our analysis focuses strictly on the statutory language and on applying Dex's actions to the terms of the UTIAA found in Utah Code section 13-11a-3(1)(b), (d), (t) (2006):

> (1) Deceptive trade practices occur when, in the course of his business, vocation or occupation:
> .....
> (b) [a] person causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services.
> .....
> (d) [a] person uses deceptive representations or designations of geographic origin in connection with goods or services.
> .....
> (t) [a] person engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.[7]

We conclude that Dex's practice of permitting corporations to advertise MEL phone numbers without listing addresses does not violate the UTIAA. Inasmuch as we have found no violation of the UTIAA, we need not reach the second question

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[6]Utah Code section 78-2-2(1) states that ""the Supreme Court has jurisdiction to answer questions of state law certified by a court of the United States.""

[7]Utah Code Ann. §§ 13-11a-3(1)(b), (d), (t) (2006).

as to whether Dex would be exempt from liability under Utah Code section 13-11a-5.[8]

¶13 We first address the statutory language of Utah Code section 13-11a-3(1)(b) to determine whether Dex has caused a likelihood of confusion as to the source, sponsorship, approval, or certification of goods or services. Next, we analyze whether pursuant to section 13-11a-3(1)(d), Dex made deceptive representations as to the geographic origin of the goods or services. Third, we consider whether Dex engaged in "any other conduct which similarly create[d] a likelihood of confusion or of misunderstanding" as required by section 13-11a-3(1)(t).

I. DEX DID NOT VIOLATE SECTION 13-11a-3(1)(b) BECAUSE THE SOURCE, SPONSORSHIP, APPROVAL, OR CERTIFICATION OF GOODS OR SERVICES IS NOT MISLEADING OR CONFUSING

¶14 DeBry first argues that Dex's publication of MEL numbers without addresses for out-of-area businesses violates section 13-11a-3(1)(b) of the UTIAA. Under section 13-11a-3(1)(b), deceptive trade practices occur when a person causes "likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services."[9] DeBry contends that when businesses list MEL numbers without *1082 addresses in advertisements, those businesses mislead consumers and violate this UTIAA provision. We disagree.

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[8]The UTIAA exemption provision found in Utah Code section 13-11a-5 states, "This chapter does not apply to:
(1) conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local governmental agency[.]"

[9]Utah Code Ann. §§ 13-11a-3(1)(b) (2006).

¶15 Although DeBry does not specify whether it claims the source, sponsorship, approval, or certification of goods and services is misleading, the implication based on the facts presented is that DeBry challenges the publication of MEL numbers without addresses as misleading as to the "source" of the advertisement. Thus, we begin by looking at the common definition of "source" as used in the statute. "Source" is generally defined as "a point of origin" or "one that supplies information."[10] In light of these definitions, we interpret the "source" of goods or services advertised in a telephone directory to ordinarily be the business that placed the advertisement. This will commonly be the company that financed the advertisement for the purpose of endorsing its own goods or services. And this "source"-the name of the business-is stated in the directory as part of the listing or advertisement.

¶16 For example, in this case, DeBry argues that one of the businesses advertising with an MEL number but no address is the law firm of Siegfried & Jensen. In such an example, the "source" of the advertised goods or services is Siegfried & Jensen because the advertisement most likely originated with and was funded by Siegfried & Jensen for the purpose of endorsing its legal services. Additionally, Siegfried & Jensen probably supplied Dex with the information contained in the advertisement.

¶17 Both the certification order and the record list several other businesses that have purchased MEL numbers for the same reason and have similarly advertised in the Ogden yellow pages. Such advertisements are not misleading or confusing as to the "source" of goods or services offered because the name of the business and its products or services are generally printed on the advertisement. Consequently, as

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[10] *Webster's Third New International Dictionary* 2177 (1986).

publisher of those advertisements, Dex has not violated section 13-11a-3(1)(b).

II. DEX'S PUBLICATION OF TELEPHONE NUMBERS DOES NOT CONSTITUTE A REPRESENTATION OF GEOGRAPHIC ORIGIN OR LOCATION FOR WHICH DEX IS LIABLE UNDER UTAH CODE SECTION 13-11a-3(1)(d)

¶18 DeBry next alleges that Dex uses "deceptive representations or designations of geographic origin in connection with goods or services."[11] We conclude that Dex makes no "representation or designation of geographic origin," much less a deceptive one. Contrary to DeBry's assertions, Dex does not purport to list only those businesses with offices physically located in the calling area; rather, Dex merely lists the contact information for businesses offering products or services to customers in the calling area, regardless of the businesses' geographic locations. For example, by listing the telephone number for the law firm of Siegfried & Jensen, Dex does not represent that the firm has an office in the calling area-it only informs customers that the firm is willing to provide its services to those located in the calling area. Absent a representation as to geographic location, Dex could not have violated Utah Code section 13-11a-3(1)(d).

III. DEX DID NOT ENGAGE IN ANY OTHER CONDUCT THAT COULD SIMILARLY CONFUSE OR MISLEAD UNDER SECTION 13-11a-3(1)(t)

¶19 Finally, DeBry contends that Dex violated the UTIAA's "catch all" provision found in section 13-11a-3(1)(t), which prohibits a person from engaging "in any other conduct which *similarly* creates a likelihood of confusion or of

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[11]Utah Code Ann. §§ 13-11a-3(1)(d) (2006).

misunderstanding."[12] Broadly speaking, MEL listings may result in some confusion or misunderstanding among consumers--some may presume that businesses with a local number have an office *1083 in the vicinity. Nonetheless, the statute requires that any confusion or misunderstanding must be of a magnitude *similar* to the related provisions.

¶20 In assessing whether conduct "similarly creates a likelihood of confusion or of misunderstanding," we note that the statute generally addresses "false front" business operations that attract customers by misrepresenting the nature, location, source, or quality of their goods or services. DeBry contends that MEL listings provide such a "false front" by permitting out-of-area businesses to use local numbers. While perhaps confusing to some, such a program does not invoke the type of deceptive misrepresentation contemplated under the statute. As we have noted, the Dex listings provide nothing more than a list of businesses willing to provide services to the calling area. That some consumers might presume more does not render the listings misleading or confusing. DeBry has not alleged that merely because the businesses are located outside the calling area, the nature, location, source, or quality of their services would be materially changed. As such, we cannot classify Dex's use of MEL numbers without addresses as confusing or misleading under section 13-11a-3(1)(t).

CONCLUSION

¶21 For the above reasons, Dex has not acted in violation of the Utah Truth in Advertising Act (UTIAA). Dex's publications did not cause a likelihood of misunderstanding or confusion as to the source, sponsorship, approval, or certification of goods or services as required by Utah Code section 13-11a-3(1)(b). Dex did not use deceptive

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[12]Utah Code Ann. §§ 13-11a-3(1)(t) (2006) (emphasis added).

representations or designations of geographic origin in connection with goods or services pursuant to section 13-11a-3(1)(d). And Dex did not engage in any other conduct similarly creating a likelihood of confusion or misunderstanding pursuant to section 13-11a-3(1)(t). Consequently, we need not determine whether Dex would be exempt under section 13-11a-5(1).

Chief Justice DURHAM, Justice DURRANT, Justice PARRISH, and Justice NEHRING concur in Associate Chief Justice WILKINS' opinion.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT J. DEBRY AND ASSOCIATES, P.C.,
a Utah corporation,

Plaintiff-Appellant,

v.

QWEST DEX, INC., a Colorado corporation; and
DEX MEDIA WEST, LLC, a Delaware
limited liability corporation,

Defendants-Appellees.

No. 04-4049
(D.C. No. 03cv0099)
(D. Utah)

ORDER AND JUDGMENT*

Before HENRY, BALDOCK, and BRISCOE, Circuit Judges.

Filed August 4, 2006
Elisabeth A. Shumaker, Clerk of the Court

We certified to the Utah Supreme Court, as a dispositive question of law in this matter, the following pursuant to 10th Cir. R. 27.1 and Utah R. App. P. 41:

> Whether Defendants violated Utah Code Ann. § 13-11a-3(1)(b), (d), or (t) when they published in their 2003-2004 Ogden-area telephone

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

> directory a table of numerical prefixes associated with a "local calling area" and advertisements by third parties that include a market expansion line telephone number without any physical business address; and if so, whether Defendants are exempt from liability under Utah Code Ann. § 13-11a-5(1).

See Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., No. 04-4049, Certification Order (10th Cir. March 21, 2005). The Utah Supreme Court graciously accepted our certification and held, under the facts as certified, that Defendant had not violated Utah Code Ann. § 13-11a-3(1)(b), (d), or (t). See Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., __ P.3d __, 2006 WL 2089138 (Utah 2006). Accordingly, the district court's judgment dismissing Plaintiff's complaint for failure to state a cause of action is--

AFFIRMED.

Entered for the Court

s/

Bobby R. Baldock
United States Court Judge

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH NORTHERN DIVISION

ROBERT J. DeBRY AND ASSOCIATES, P.C., a Utah Corporation,

Plaintiff,

vs.

QWEST DEX, INC., a Colorado Corporation, and DEX MEDIA WEST LLC, a Delaware Limited Liability Company,

Defendants.

Case No. 1:03CV0099

ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS

Filed March 5, 2004

Before the court are Defendants Qwest Dex, Inc.'s and Dex Media West LLC's (collectively "Dex") Motion to Dismiss All Claims (#37-1), Plaintiff Robert J. DeBry and Associates, P.C.'s ("DeBry") Motion for Partial Summary Judgment (#44-1), and DeBry's Motion for Leave to File Surreply Memorandum (#61-1). The court has carefully considered the supporting and opposing memoranda filed in conjunction with each motion. Because the court agrees with Dex that DeBry has failed to state a claim upon which relief can be granted, the court GRANTS Dex's motion. Accordingly, the court DENIES DeBry's motion for partial summary judgment as MOOT and DENIES DeBry's motion to file a surreply memorandum.

I. BACKGROUND

This case stems from advertisements Dex published in its 2003-2004 Ogden, Utah telephone directory. DeBry

contends Dex intentionally interfered with DeBry's potential economic relations and violated the Utah Truth in Advertising Act[1] (TIAA) by publishing yellow page ads that contained a business's market expansion line (MEL) phone number but no address. A MEL number allows customers to dial a local phone number to connect with an out-of-area business without paying long distance charges. For example, telephone calls from Ogden, Utah, to Salt Lake City, Utah, are usually long-distance. A Salt Lake City business, however, could secure a MEL number with an Ogden prefix. Should an Ogden customer dial the Salt Lake City business's Ogden MEL number, the call is automatically routed to the Salt Lake City office, thereby saving the Ogden customer long distance costs.

DeBry claims the ads in Dex's phone book are deceptive trade practices under the TIAA because the ads contain Ogden-area prefixes even though the businesses are not located in Ogden; as such, DeBry claims, Ogden consumers are likely confused "as to the source, sponsorship, approval, or certification of goods or services."[2] In addition, DeBry claims the ads constitute intentional interference with DeBry's potential economic relations. According to DeBry, the ads with MEL numbers but no addresses led DeBry's potential clients to hire out-of-Ogden attorneys rather than attorneys from DeBry's now-closed Ogden office because the potential clients were unable to discern the actual physical location of DeBry's competitors.

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[1]Utah Code Ann. §§ 13-11a-1 to -5 (2001).

[2]Utah Code Ann. § 13-11a-3(1)(b).

II. ANALYSIS

A. Procedural Posture

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be dismissed for failure to state a claim upon which relief can be granted "if it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief."[3] A plaintiff has "the burden of alleging sufficient facts on which a recognized legal claim could be based."[4] A plaintiff need not describe every fact in "specific detail," but "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based."[5] This court must assume "[a]ll well-pleaded facts, as distinguished from conclusory allegations," as true; "view all reasonable inferences in favor of the plaintiff;" and liberally construe the pleadings.[6] The court will examine Dex's motion under this framework.

A. DeBry's TIAA Claim

DeBry seeks relief under three subsections of Utah's TIAA. First, under § 13-11a-3(1)(b), DeBry alleges Dex caused a "likelihood of confusion or of misunderstanding as to the source . . . of goods or services" by including Ogden MEL numbers in phone book ads for non-Ogden businesses but

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[3]*Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence,* 927 F.2d 1111, 1115 (10th Cir. 1991).

[4]*Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991).

[5]*Id.*

[6]*Ruiz v. McDonnell,* 299 F.3d 1173, 1181 (10th Cir. 2002) (quoting *Swanson v. Bixler,* 750 F.2d 810, 813 (10th Cir. 1984)).

excluding the business's address.[7] Next, under § 13-11a-3(1)(d), DeBry alleges Dex's phone book ads are deceptive trade practices because they make "deceptive representations or designations of geographic origin in connection with goods or services."[8] Finally, under § 13-11a-3(1)(t), DeBry alleges Dex violated TIAA's catch-all provision because publishing the ads with MEL numbers but without addresses was other "conduct which . . . creates a likelihood of confusion or of misunderstanding."[9]

DeBry's first claim under § 13-11a-3(1)(b) fails because of the language of § 13-11a-3(1)(d). The Supreme Court recently stated "[i]t is 'a cardinal principal of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"[10] In this case, subsection 3(1)(b) of the TIAA prohibits trade practices that are likely to cause confusion or misunderstanding as to the "source" of goods or services; subsection 3(1)(d) bans trade practices that deceptively misrepresent "designations of *geographic origin* in connection with goods or services."[11] If subsection 3(1)(b)'s "source" is identical to 3(1)(d)'s "geographic origin," the latter subsection would add nothing to the TIAA's overall statutory scheme. As a result, this court will construe the TIAA's subsection 3(1)(b)'s reference to "source"

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[7]Utah Code Ann. § 13-11a-3(1)(b).

[8]*Id.* § 13-11a-3(1)(d).

[9]*Id.* § 13-11a-3(1)(t).

[10]*TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

[11]*Id.* § 13-11a-3(1)(d) (emphasis added).

as referring to a product's *manufacturer* or a service's *provider* rather than the *geographic location* in which the product or service originates. This interpretation gives full effect to subsection 3(1)(d), wherein the Utah Legislature specifically provided a remedy for geographically misdescriptive trade practices.

Viewed in this light, DeBry has not stated a claim under subsection 3(1)(b). DeBry's pleadings contain no factual allegations that the MELs in Dex's phone book ads caused potential Ogden clients to contact a firm *other than* DeBry when the potential client *actually* intended to call DeBry. Because DeBry does not claim the MEL ads caused confusion about the *provider* of legal services, it fails to state a claim under § 13-11a-3(1)(b).

DeBry also fails to state a claim under § 13-11a-3(1)(d). DeBry's claim that Dex "has used deceptive representations or designations of geographic origin in connection with legal services it advertised on behalf of some of DeBry's competitors" stems from a table Dex printed in the front of its 2003-2004 Ogden, Utah directory.[12] Under the title "Ogden & Vicinity Local Calling Region," the table states "[t]he prefix(es) listed beside your community and those communities listed below it, represent your local calling area . . . . For Qwest Customers, this is a complete list of your calling area."[13] The table then lists all Ogden-area phone prefixes. DeBry claims the MELs in the phone book ads are geographic misrepresentations because a potential Ogden client could compare the MEL prefix in a phone book ad against the table and thereby assume the phone number was for an Ogden-based law firm.

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[12]Amended Complaint (#26-1) ¶ 32.

[13]*Id.* ¶ 12.

This claim seems quite dubious on its face. In any event, DeBry's claim fails because the table does not state the Ogden-area prefixes are assigned *solely* to Ogden-based business. Dex's table states the "prefix(es) listed beside your community and those communities listed below it, represent your *local calling area* . . . . For Qwest Customers, this is a complete list of your *calling area.*"[14] The table, then, conveys to phone book users the prefixes they may dial from an Ogden telephone without incurring long distance charges. Neither the ads nor the table in Dex's phone book state that, by dialing an Ogden-area prefix, customers will secure legal work that will *originate from an Ogden attorney.* Instead, the ads simply provide a local number Ogden-area residents may call when seeking legal representation. Thus, the ads in Dex's phone book are not "deceptive representations or designations of geographic origin in connection with legal services."[15] Accordingly, DeBry has failed to state a claim under § 13-11a-3(1)(d).

Finally, DeBry fails to state a claim under §13-11a-3(1)(t). This subsection prohibits "any other conduct which similarly creates a likelihood of confusion or of misunderstanding."[16] DeBry has not pled facts that, if true, would show the ads created "a likelihood of confusion or of misunderstanding" in a manner other than that covered by subsection 3(1)(d). As such, DeBry's amended complaint fails to state a claim under § 13-11a-3(1)(t).

As alternative grounds for dismissal, Dex argues DeBry's claims must fail because Dex's conduct is exempt

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[14] *Id.* (emphasis added).

[15] *Id.* ¶ 31.

[16] Utah Code Ann. § 13-11a-3(1)(t).

under the TIAA. Utah Code Arm. § 13-11a-5(1) states the TIAA "does not apply to conduct in compliance with the orders or rules of, or a statute administered by, a federal, state, or local government agency."[17] In this case, Dex argues the phone book ads comply with a tariff governing MELs that Dex filed with the Utah Public Service Commission (PSC) pursuant to Utah Code Ann. § 54-3-3. Dex correctly states that "tarriffs have the force of law."[18] The tariff at issue states that upon purchasing a MEL number, Dex will provide the purchaser with "one free listing in the White and Yellow Page directories covering the exchange in which the MEL CO is located; however, at the customer's request, the listing may be omitted at no charge."[19] Significantly, the tariff does not require that the ads displaying the MEL number also display an address. Thus, Dex argues, it is immune under TIAA because it complied with the "order or rule" (the tariff) administered by the "state . . . government agency" (PSC) when it printed the ads. This argument likely is correct; however, in light of the court's decision regarding DeBry's claims under the TIAA, it need not decide whether the tariff indeed immunizes Dex from liability under the TIAA.

B. DeBry's Intentional Interference With Prospective Economic Relations Claim

DeBry also alleges that Dex intentionally interfered with DeBry's prospective economic relations by publishing competitors' ads that contained a MEL number but no address.

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[17]*Id.* § 13-11a-5(1).

[18]*Mountain States Tel. & Tel Co. v. Atkin, Wright & Miles, Chartered,* 681 P.2d 1258, 1263 (Utah 1984) (citing *Shehi v. Southwestern Bell Tel. Co.,* 382 F.2d 627 (10th Cir. 1967)).

[19]*See* Dex's Motion Ex. A.

Under Utah tort law, however, DeBry has failed to state a claim upon which relief can be granted.

The Utah Supreme Court first recognized the common-law tort of intentional interference with prospective economic relations in *Leigh Furniture & Carpet Co. v. Isom.*[20] *Leigh Furniture* held that plaintiffs alleging this tort "must prove (1) that the defendant intentionally interfered with the plaintiffs existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff."[21]

In *Leigh Furniture,* the Utah Supreme Court noted that "[d]riving away an individual's existing or potential customers is the archetypical injury this cause of action was devised to remedy."[22] Thus, the first element requires a plaintiff to show a defendant has "intentionally interfered with and caused a termination of some of [the plaintiff's] relationships (actual or potential)."[23] This element was satisfied in *Leigh Furniture* because the defendant "imposed heavy demands on [plaintiffs] time and financial resources to the detriment of his ability to attract and retain customers and conduct the other activities of his business" by writing numerous letters of complaint, demanding an inventory and financial audit during the busy holiday season, threatening to cancel contracts, refusing to satisfy contractual obligations, and preventing the consummation of potentially profitable business alliances.[24]

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[20]675 P.2d 293 (1982).

[21]*Id.* at 304.

[22]*Id* at 306.

[23]*Id.*

[24]*See id.*

Leigh Furniture's second element is stated in the alternative: a plaintiff must show the defendant intentionally interfered with potential economic relations either "for an improper purpose" or "by improper means."[25] "Improper purpose is established by a showing that the actor's predominant purpose was to injure the plaintiff."[26] "Improper means are present 'where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules.'"[27] "Improper means include 'violence, threats, or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood.'"[28] Moreover, [m]eans may also be improper or wrongful because they violate an established standard of a trade or profession."[29]

Finally, *Leigh Furniture's* third element requires a plaintiff to show that a defendant's intentional interference, by improper means or an improper purpose, was causally related to the plaintiff's losses.

Applying these rules to the present case, it becomes clear that DeBry has not stated a claim for intentional interference with prospective economic relations. First, DeBry has not alleged the kind of facts necessary to support a finding that Dex *intentionally* interfered with DeBry's potential economic relations. Even assuming DeBry's allegations are

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[25]*Id.* at 304.

[26]*St. Benedict's Development Co. v. St. Benedict's Hospital,* 811 P.2d 194, 201 (Utah 1991) (citing *Leigh Furniture,* 657 P.2d at 307)).

[27]*Id.* (citing *Leigh Furniture,* 657 P.2d at 308).

[28]*Id.*

[29]*Id.* (internal quotation marks omitted).

true, there are no facts showing Dex has committed the "archetypical injury" of "driving away" DeBry's potential or current clients. Unlike the liable party in *Leigh Furniture,* Dex has not imposed heavy demands on DeBry's time and financial resources to the detriment of DeBry's ability to attract and retain customers, refused to satisfy any contractual obligations, or prevented DeBry from consummating any business alliance. DeBry's complaint is simply void of any facts supporting the allegation that Dex's intent in publishing the MEL ads was to interfere with DeBry's ability to acquire potential Ogden clients. Thus, DeBry fails to satisfy *Leigh Furniture's* first element.

In addition, DeBry's complaint fails to satisfy *Leigh Furniture's* second element. DeBry has conceded Dex did not act for an improper purpose.[30] DeBry's ability to prove the second element, therefore, hinges on whether Dex intentionally interfered with DeBry's potential economic relations through improper means. The court has determined that DeBry's complaint does not allege facts that show Dex employed "improper means" as explained in *Leigh Furniture* or its progeny. Because DeBry's complaint does not recite facts that, if accepted as true, would establish Dex violated the TIAA, DeBry cannot allege Dex's improper means was a statutory violation.[31] Moreover, DeBry has not stated facts that demonstrate Dex interfered with DeBry or DeBry's potential clients in a violent, threatening, intimidating, or defamatory manner.[32]

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[30] Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss (#43-1) at 6-7.

[31] *See St. Benedict 's Development Co.*, 811 P.2d at 201.

[32] *See id.*

Because DeBry's complaint does not allege facts that satisfy *Leigh Furniture's* first or second elements, it fails to state a claim of intentional interference with prospective economic relations for which this court may grant relief. Accordingly, DeBry's second cause of action must be dismissed.

III. CONCLUSION

DeBry's complaint is replete with conclusory statements and legal assertions but void of facts that, if true, would entitle DeBry to relief from this court, and the few well-pled facts in DeBry's claim do not amount to a cognizable legal wrong. Accordingly, the court GRANTS Dex's motion (#37-1) and dismisses DeBry's amended complaint with prejudice. The court also DENIES DeBry's partial summary judgment motion (#44-1) as moot and DENIES DeBry's motion for leave to file a surreply memorandum (#61-1). The clerk's office is directed to close the case.

SO ORDERED.

DATED this 4th day of March, 2004.

BY THE COURT:

s/ PAUL G. CASSELL
United States District Judge.

IN THE UTAH SUPREME COURT.

Robert J. Debry and Associates, P.C., a Utah corporation,
Appellant and Petitioner,

v.

Qwest Dex, Inc., a Colorado Corporation; and Dex Media West, LLC, a Delaware limited liability corporation,
Appellees and Respondents.

Case No. 20050299-SC

July 28, 2006.

Filed Utah Appellate Courts Sep 15, 2005

ORDER

This matter is before the court upon Appellants' Petition for Rehearing, filed on August 10, 2006.

IT IS HEREBY ORDERED that pursuant to Rule 35 of the Utah Rules of Appellate Procedure the petition for rehearing is denied.

For The Court:

September 15, 2006

s/ Christine M. Durham
Chief Justice

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ROBERT J. DEBRY AND ASSOCIATES, P.C.,
a Utah corporation,

Plaintiff-Appellant,

v.

QWEST DEX, INC., a Colorado corporation; and
DEX MEDIA WEST, LLC, a Delaware
Limited Liability Company,

Defendants-Appellees.

No. 04-4049

ORDER
Filed October 18, 2006

Before HENRY, BALDOCK, and BRISCOE, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: s/ Patrick Fisher
Deputy Clerk

(2)

No. 06-983

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROBERT J. DEBRY AND ASSOCIATES, P.C.

Petitioner,

vs.

QWEST DEX, INC., and DEX MEDIA WEST, LLC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Sup. Ct. R. 29.6, Respondent Dex Media West, LLC purchased the assets of Qwest Dex, Inc. relevant to this case and acquired its liabilities in a transaction that closed in September 2003. Dex Media West, LLC is wholly-owned by Dex Media West, Inc., which is in turn wholly-owned by Dex Media, Inc. R.H. Donnelly Corp. purchased all outstanding stock and assumed all liabilities of Dex Media, Inc. effective January 31, 2006.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. The Supreme Court Should Deny DeBry's Petition Because It Raises No Issues Warranting This Court's Review	4
A. The Petition presents no Circuit split, conflict with Supreme Court precedent, or other cognizable grounds for certiorari	4
B. The record of this case makes it ill-suited for this Court's review	8
C. The Tenth Circuit's unanimous decision is unpublished and the Utah Supreme Court's decision is beyond review	9
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888 (1988) 11

County of Westchester v. Commissioner of Transp., 9 F.3d 242 (2d Cir. 1993) 5, 6, 7

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 6, 11

Gryger v. Burke, 334 U.S. 728 (1948) 11

Martin v. Walton, 368 U.S. 25 (1961) 11

Mullaney v. Wilbur, 421 U.S. 684 (1975) 9, 10, 11, 12

Railroad Comm'rs v. Pullman Co., 312 U.S. 496 (1941) 10

Reinkmeyer v. Safeco Ins. Co., 166 F.3d 982 (9th Cir. 1999) 10

Robert J. DeBry & Assoc. v. Qwest Dex, Inc., 144 P.3d 1079 (Utah 2006) 10

Tarr v. Manchester Ins. Co., 544 F.2d 14 (1st Cir. 1976) 10

STATUTES AND RULES

U.S. Sup. Ct. Rule 10 ..... 4, 5

Utah Code Ann. § 13-11a-3 ..... 7, 8, 9

Utah R. App. Pro. 41 ..... 10, 11

STATEMENT OF THE CASE

Petitioner Robert J. DeBry and Associates ("Plaintiff" or "DeBry") is a personal injury law firm doing business throughout the State of Utah. Defendants and Appellees, Qwest Dex, Inc. and Dex Media West LLC (collectively referred to as "Dex"), print telephone directories throughout the State of Utah.

DeBry sued Dex under the Utah Truth in Advertising Act ("UTIAA") over Dex's sale and publishing of advertisements featuring Market Expansion Line ("MEL") phone numbers[1] but no address. DeBry alleged that such ads lead consumers to believe that the advertiser is a "local" business when in fact it may be located in a neighboring community, and that consumers are misled because the ad features a phone number with a "local" prefix. The lack of an address allegedly hinders the consumer's ability to discern the advertiser's whereabouts. DeBry claims that such advertisements, when used by its competitors, lead prospective clients to retain other personal injury law firms, thereby causing it damages in the form of lost revenue.

DeBry commenced its action in the State Second District Court of Weber County, Utah. Dex removed the case to the United States District Court for the District of Utah pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Following removal, Dex moved to dismiss DeBry's claims under Fed. R. Civ. P. 12(b)(6). The District Court of Utah granted the motion, holding that DeBry failed to state a

[1] MEL phone numbers feature call-forwarding functionality. That is, when a party calls a MEL number the call is automatically routed to another local or long distance number.

claim under any of the three provisions of the UTIAA pled in the Amended Complaint. The court also dismissed DeBry's claim for tortious interference with prospective economic relations. (App. D-11)

DeBry then appealed the dismissal of its UTIAA claim to the United States Court of Appeals for the Tenth Circuit. Following submission of the parties' appellate briefs, the Tenth Circuit panel determined *sua sponte* that the appeal presented a novel question of Utah State law and therefore certified the following question to the Utah Supreme Court pursuant to 10th Cir. R. 27.1 and Utah R. App. P. 41:

> Whether Defendants violated Utah Code Ann. § 13-11a-3(1)(b), (d), or (t) when they published in their 2003-2004 Ogden-area telephone directory a table of numerical prefixes associated with a "local calling area" and advertisements by third parties that include a market expansion line telephone number without any physical business address; and if so, whether Defendants are exempt from liability under Utah Code Ann. § 13-11a-5(1).

(App. A-1, 2)

The Utah Supreme Court answered the first part of the certified question in the negative, concluding that Dex had not violated any of the paragraphs of Utah Code Ann. § 13-11a-3(1) at issue and therefore declined to address the second part of the certified question relating to Utah Code Ann. § 13-11a-5(1) as unnecessary. (App. B-9, 10)

DeBry then filed a Petition for Rehearing with the Utah Supreme Court, arguing that it had ignored certain facts in the Tenth Circuit panel's certification order. The

Utah Supreme Court denied DeBry's petition without comment. (App. E-1)

Upon return to the Tenth Circuit, the panel adopted the Utah Supreme Court's ruling and affirmed the dismissal of DeBry's UTIAA claim. (App. C-1, 2) DeBry then filed a Petition for Rehearing with the Tenth Circuit panel, which was also denied without comment. (App. F-1) DeBry's Petition for Writ of Certiorari to this Court followed.

SUMMARY OF THE ARGUMENT

DeBry's Petition does not present issues which warrant this Court's review. There is no split between Federal Circuits or State supreme courts at issue here, nor did the decision of the Tenth Circuit deviate from this Court's jurisprudence. At each stage of the case, each court to hear DeBry's arguments has ruled against it, including two unanimous decisions by both a panel of the United States Tenth Circuit Court of Appeals and the Utah Supreme Court. Finally, the Utah Supreme Court's ruling on a question of state law is, on the facts here, beyond this Court's power to review. Even if this Court were to grant the requested relief, the Federal courts would still be bound by the State court's interpretation of its own State laws and procedures and therefore would be compelled to reach the identical result on remand. DeBry's Petition should accordingly be denied.

ARGUMENT

I. The Supreme Court Should Deny DeBry's Petition Because It Raises No Issues Warranting This Court's Review.

A. The Petition presents no Circuit split, conflict with Supreme Court precedent, or other cognizable grounds for certiorari.

Rule 10 of this Court recites that certiorari will be granted only for "compelling reasons" and sets forth the most likely grounds for review:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

U.S. Sup. Ct. R. 10. Patently, neither Rule 10(b) nor (c) are implicated in DeBry's Petition – the Tenth Circuit panel and Utah Supreme Court made no decisions regarding

federal questions, not even implicitly. With regard to the grounds of Rule 10(a), there is no allegation in the Petition of conflicting rulings either between Federal Circuits or between the Circuits and State supreme courts. The sole possible basis for certiorari that can be discerned from the Petition is that DeBry is implicitly arguing that the Tenth Circuit panel, by accepting the Utah Supreme Court's answer to the certified question containing a recitation of facts which did not perfectly track the language of the certification order, has somehow "departed from the accepted and usual course of judicial proceedings," as proscribed by Rule 10(a). Yet, even assuming the Utah Supreme Court's recitation of the facts deviated in some manner from the facts given in the certified question, that would not merit a grant of certiorari given past case law on the subject.

Despite DeBry's assertion that there are "[p]robably . . . *many many* other cases" involving State supreme courts "sidestepping" certified questions, Petition, p. 14 (emphasis in original), Dex has only been able to locate one case in which such an allegation was seriously made, and the guidance of the Circuit Court there is fully applicable here. In *County of Westchester v. Commissioner of Transportation*, 9 F.3d 242 (2d Cir. 1993), the Second Circuit certified a question to the Connecticut Supreme Court asking whether it was possible to obtain an avigation easement by prescription. The Connecticut Supreme Court refused to answer the question, explaining that while prescriptive easements were possible under Connecticut law, the easement had to be obtained through adverse conduct. Since the conduct described in the certified question could not be considered adverse, the court concluded that no such easement could have been

created. *Id.* at 246. After the case returned to the Second Circuit, the plaintiff asked the court to reject the Connecticut Supreme Court's ruling, because the Connecticut Supreme Court did not answer the certified question and improperly based its decision on independent findings of fact. The Second Circuit rejected that argument stating:

> The County argues that the Court did not respond to the questions certified and that the Court improperly based its decision on independent findings of fact. Putting to one side the question whether we could reject the Connecticut Court's response – the County cites no case where that has occurred – we see no persuasive reason why we should do so. It is true that the Court did not answer precisely the first question we certified, *i.e.*, the general question of whether an avigation easement can be acquired by prescription under Connecticut law. Nonetheless, the Court did answer a material subset of that question, *i.e.*, whether an avigation easement can be acquired under Connecticut law in these circumstances. We believe that the Connecticut Supreme Court's decision is dispositive, both as responsive to our certification and also, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), as a controlling statement of state law regarding a common law claim.
>
> The County asserts that "the Connecticut Supreme Court has disregarded the mandate of this Court, and usurped the jurisdiction of this Court by presuming to decide an ultimate question of fact which is the sole prerogative of this Court." We think the County mischaracterizes the Connecticut Supreme Court's opinion. To the contrary, the Court applied Connecticut's adverse use requirement to the record supplied by the

> district court and determined that the County could not, as a matter of Connecticut law, have acquired a prescriptive avigation easement.

County of Westchester, 9 F.3d at 246-47. Accordingly, the Second Circuit accepted the Connecticut Supreme Court's ruling on the certified question.

This guidance is clear, uncontradicted by any other authority, and is fully applicable to the instant case as can be seen from the face of DeBry's Petition for Certiorari.[2] In its Petition to this Court, DeBry recites a number of alleged differences between the facts recited in the Tenth Circuit panel's certification order and the Utah Supreme Court's decision. *See* Petition, pp. 11-14. However, even if those differences are viewed as something more than a minor variation in wording, they are still a "material subset" of the certified question, as was the situation in *County of Westchester*, 9 F.3d at 246-47. For example, UTIAA does not set any minimum number on how many consumers must be deceived before an action will lie, nor does the statute use the words "trick" or "mislead." *See* Utah Code Ann. §§ 13-11a-3(1)(b), (d) & (t) (App. B-5) Thus, whether the Utah Supreme Court accepted DeBry's figure that "67% of Dex consumers are tricked or misled" or, as the Utah Court recited in its decision, "some" consumers are subject to "confusion or misunderstanding," (App. B-9), is irrelevant to the certified question – the recitation of facts in the Utah Court's decision were a material subset of the facts as certified.

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[2] Although the Tenth Circuit panel did not specifically cite the *County of Westchester* decision in its denial of DeBry's Petition for Rehearing, Dex discussed the case at length in its Response to the Petition for Rehearing.

In short, the Tenth Circuit panel directed the Utah Supreme Court to answer whether Dex *violated* UTIAA. (App. A-1, 2) The Utah Court answered that question in the negative and the Tenth Circuit was fully satisfied with that response. In the absence of any contrary authority from another Circuit or this Court, and given the well-reasoned on-point authority already issued by the Second Circuit in *County of Westchester*, there is no reason for review.

B. The record of this case makes it ill-suited for this Court's review.

Not only has DeBry failed to raise any issue meriting this Court's review but, given the record of this case, even if this Court was to ultimately rule in DeBry's favor the final result on remand would be the same. DeBry is implicitly asking this Court to order the Tenth Circuit panel to set aside the Utah Supreme Court's answer to the certified question and instead make a *de novo* interpretation of Utah Code Ann. § 13-11a-3 and other sections of UTIAA as necessary. However, as the record in this case shows, DeBry already argued for its preferred interpretation of UTIAA to the Tenth Circuit panel in its original appellate brief. The panel concluded it required guidance on the statutes at issue, certified the interpretation question to the Utah Supreme Court, and then adopted the resulting opinion of that court in its entirety without either a concurrence or dissent that might suggest any doubt on the panel's part as to the correctness of the Utah Supreme Court's determination. (App. C-1, 2) On DeBry's petition for rehearing (which made substantively identical arguments to those it makes here), the Tenth Circuit panel again unanimously rejected its arguments. In short, there

is nothing in the record to suggest that a different outcome would result on remand, even if the Tenth Circuit was to undertake a *de novo* review of the statutes at issue. Indeed, as discussed *infra*, even if this Court were to give DeBry its requested relief, the Utah Supreme Court's opinion would remain binding precedent on the interpretation of Utah Code Ann. § 13-11a-3. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court, however, repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here.") (citations omitted). Thus, on remand the Tenth Circuit would be bound to reach the same result again. This Court and the Tenth Circuit both have better uses for their time than replaying a case to reach the same outcome.

C. The Tenth Circuit's unanimous decision is unpublished and the Utah Supreme Court's decision is beyond review.

The Tenth Circuit did not select its Order and Judgment in this case for publication. As the footnote on the first page of the Tenth Circuit's Order and Judgment states: "This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel." (App. C-1) Consequently, the Tenth Circuit's decision in this action has not established precedent within the Circuit and, therefore, has no broad impact. This fact weighs against granting DeBry's Petition. Furthermore, the Order and Judgment of the Tenth Circuit in this case was unanimous. There is no indication that the actions of the Utah Supreme Court presented issues that any member of the Tenth Circuit panel found

troubling, despite DeBry's strained efforts to raise their interest via its Petition for Rehearing.

The Utah Supreme Court's opinion on the certified question *was* published in the Pacific Reporter at 144 P.3d 1079, pursuant to Utah R. App. Pro. 41(h) which directs that opinions on certified questions are to be published and reported. However, that is irrelevant to the matter of whether this Court should grant DeBry's Petition. Indeed, even if this Court were to ultimately grant DeBry its requested relief, that would not overrule, vacate, or otherwise impact the vitality of the Utah Supreme Court's opinion interpreting UTIAA.

As this Court has stated, "The last word on the meaning of [a state statute] belongs neither to us nor to the district court but to the Supreme Court of [the state]." *Railroad Comm'rs v. Pullman Co.*, 312 U.S. 496, 499-500 (1941); *see also Mullaney*, 421 U.S. at 691; *Reinkmeyer v. Safeco Ins. Co.*, 166 F.3d 982, 984 (9th Cir. 1999) ("We are bound by the answers of state supreme courts to certified questions just as we are bound by state supreme court interpretations of state law in other contexts.") (collecting cases); *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 14 (1st Cir. 1976) ("No matter what the result, we cannot 'correct' a state court's interpretation of its own law."). The Utah Supreme Court's interpretation of UTIAA in this case will remain binding precedent on the subject until either the Utah State Legislature amends the statute or the Utah Supreme Court overrules itself in some hypothetical future case.

Furthermore, the entire basis for DeBry's assertion that the Utah Supreme Court "had no power to decide fact issues" (which it did not do) is based on the language of

Rule 41(c)(2) of the ***Utah*** Rules of Appellate Procedure. Just as this Court is ordinarily without power to review a State court's interpretation of State statutes or application of State common law, so too is it equally without power to review a State court's application of its own procedural rules unless it rises to the level of a violation of the U.S. Constitution. *Martin v. Walton*, 368 U.S. 25, 25-26 (1961) (application of state supreme court procedural rules presented no question for review so long as they did not violate the Fourteenth Amendment to the U.S. Constitution); *see also Gryger v. Burke*, 334 U.S. 728, 731 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."). DeBry has made *no* allegations that its Fourteenth Amendment rights were violated by either the Tenth Circuit or Utah Supreme Court and any such argument coming in reply for the first time should plainly be rejected as untimely raised. *See Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 895 (1988).

The only way on these facts that this Court could direct a Federal appellate court to ignore a State supreme court's interpretation of State law or override a State supreme court's application of its own procedural rules, as DeBry requests, would be by overruling *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) – the absolute bedrock of modern diversity jurisprudence.[3] This is not the case to

[3] Dex acknowledges this Court identified a very narrow exception to the *Erie* doctrine in *Mullaney*, where it noted that Federal courts could revisit a state court's interpretation of state law if the state court was engaged in "obvious subterfuge to evade consideration of a federal

(Continued on following page)

revolutionize the operation of a substantial part of the American legal system.

CONCLUSION

For all the foregoing reasons, Dex opposes DeBry's Petition and respectfully requests that the Court deny it.

Respectfully submitted,

BOBBEE J. MUSGRAVE, ESQUIRE
(Counsel of Record)
PAUL J. LOPACH, ESQUIRE

Attorneys for Respondents

February 16, 2007

issue." 421 U.S. at 691 n.11. However, DeBry has not alleged any such subterfuge in this case.

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(3)

Docket No. 06-983

IN THE UNITED STATES SUPREME COURT

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Robert J. DeBry and Associates, P.C. is a nongovernmental Utah corporation. It does not have a parent corporation, nor is there any publicly held company that owns more than 10% of this corporation's stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES v

ARGUMENT 1

I. THIS COURT'S REVIEW IS NEEDED TO PRESERVE THE BALANCE BETWEEN FEDERAL AND STATE COURTS. 1

II. FEDERAL COURTS MUST NOT BLINDLY ACCEPT A STATE COURT'S FINAL DECISION IF THAT DECISION IS BASED ON THE WRONG FACTS. 2

III. IT IS NOT A FUTILE GESTURE FOR THIS COURT TO INSRUCT THE TENTH CIRCUIT TO DECIDE THIS CASE BASED ON THE ACTUAL FACTS. 3

CONCLUSION 5

TABLE OF CITED AUTHORITIES

CASES

Lehman Brothers v. Schein, 416 U.S. 386, 94 S. Ct. 1741, 40 L.Ed.2d 215 (1974) 1

Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc., 2006 UT 41, 144 P.3d 1079 2-4

STATUTES

§13-11a-1, et seq., *Utah Code* 3, 4

ARGUMENT

I. THIS COURT'S REVIEW IS NEEDED TO PRESERVE THE BALANCE BETWEEN FEDERAL AND STATE COURTS.

In its Petition for Writ of Certiorari (at 14), DeBry quoted from the case of *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L.Ed.2d 215 (1974) as follows:

> It [certification] does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.

DeBry went on to point out that courts would realize such savings if this Court would instruct federal courts on their responsibility after receiving a state court's answer to a certified question. That is, there are probably many, many other cases where state courts sidestep certified questions, answering them based on new or twisted facts.

In opposition, Dex argues that it has only been able to locate one case in which such an allegation was addressed. Opposition at 5. On this basis, Dex asserts that there is no reason for this Court to give guidance regarding this issue.

However, such a case represents only the tip of the iceberg. Dex has set forth many arguments before this Court as to why parties may feel it would be futile to ask the federal court to address the merits of a case when a state court has answered a certified question. Nevertheless, this Court needs to give guidance so that federal courts will properly discharge their responsibility.

It is important for this Court to clearly instruct federal courts to address the actual facts of the cases before them. Federal courts cannot blindly rely on state courts that have taken a shortcut and provided an answer based on facts different from those certified. By following such instruction,

federal courts can receive guidance from state courts without compromising the integrity of the federal court system.

II. FEDERAL COURTS MUST NOT BLINDLY ACCEPT A STATE COURT'S FINAL DECISION IF THAT DECISION IS BASED ON THE WRONG FACTS.

In its Petition for Writ of Certiorari (at 11-14), DeBry pointed out how the facts found in the Tenth Circuit's Order Certifying State Law Question (App. A) differed substantially from the facts used by the Utah Supreme Court in answering the certified question. See *Robert J. DeBry and Assocs. P.C. v. Qwest Dex, Inc.*, 2006 UT 41, 144 P.3d 1079 (App. B).

In opposition, Dex argued that the means by which the Utah Supreme Court reached its final answer were irrelevant. That is, Dex argued that it did not matter that the reasoning was based on different facts, or that "material subsets" of the certified question were erroneous. Opposition at 7. All that mattered was that the final conclusion was what Dex had sought.

It is true that the final conclusion was what the Tenth Circuit followed. However, federal courts must not be blind or cavalier in accepting the bottom-line conclusion reached by a state court.

Rather, the federal court must glean the pronouncements of state law from the state court's opinion. The federal court must then apply state law to the actual facts. If the federal court does anything less, it abdicates its responsibility.

III. IT IS NOT A FUTILE GESTURE FOR THIS COURT TO INSRUCT THE TENTH CIRCUIT TO DECIDE THIS CASE BASED ON THE ACTUAL FACTS.

Dex argued in its this Petition for Writ of Certiorari that "the Utah Supreme Court should have applied Utah law to the factual scenario set forth in the Certification Order." Petition at 14.

In response, Dex argued that "the final result on remand would be the same." Opposition at 8. Dex's argument was based on the principle that the Tenth Circuit must follow the Utah Supreme Court regarding Utah law, and therefore must inevitably reach the same result.

However, a review of the decision of the Utah Supreme Court shows that Utah law does not require dismissal of this case.

It is true that, as a matter of law, the Utah Supreme Court interpreted the word "source" to be the identity of the business advertised, not the location of the business. App. B-7. Since consumers were not confused as to the identity of the business, there was indeed no violation of subsection 13-11(a-3)(1)(b) of the *Utah Code*.[1]

However, the Utah Supreme Court did not eliminate violations of subsections 13-11(a-3)(1)(d) and (t) in the same way.

---

[1] "A person causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services."

Addressing subsection 13-11(a-3)(1)(d),[2] the Utah court concluded there were no deceptive representations or designations of geographic origin. However, its basis was that Dex "only informs customers that the firm is willing to provide its services to those located in the calling area." App. B-8. (Emphasis added). Clearly, that is not a legal pronouncement. Thus the court's conclusion that there was no violation of this subsection was based on a new fact.

Going on to subsection 13-11(a-3)(1)(t),[3] the Utah Supreme Court ruled (as a matter of law) that subsection (t) only addressed matters of similar magnitude. It then went on to examine whether Dex's actions were of similar magnitude. But the court decided the deceptions were not of similar magnitude because "some may presume that businesses with a local number have an office in the vicinity." App. B-9. (Emphasis added.) The court thus used facts of a magnitude very different from the magnitude of the certified facts that "67% of Dex customers are tricked or misled." App. A-3. (Emphasis added.)

In sum, the Tenth Circuit Court, following Utah law, can and should reach a different result in this case. Following state law does not mean that a federal court must invariably adopt conclusory statements based on facts different from the certified facts.

---

[2] "A person uses deceptive representations or designations of geographic origin in connection with goods or services."

[3] "A person engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding."

CONCLUSION

The fact that litigants may give up when a state court rules against them does not warrant the conclusion that only a few state courts are answering certified questions based on facts other than those in the certification orders.

It is not immaterial that a state court answers a certified question based on new facts. Rather than blindly accepting such an answer, a federal court must glean legal pronouncements from the opinion. The federal court must then apply state law to the true facts of the case.

This Court should accept certiorari and tell federal courts what to do when state courts answer certified questions based on different facts. This case should then be remanded to the Tenth Circuit.

DATED this 23rd day of February, 2007.

LYNN P. HEWARD

(Counsel of Record) Attorney for Petitioner